[COURT OF CRIMINAL APPEAL]

McELWAINE, C.J., POYSER, C.J. (F.M.S.) AND TERRELL, J.A.

LECHMAN SINGH AND ANOTHER v. REX.

(PENANG CRIMINAL APPEAL No. 1 of 1939)

Criminal Law—Summing up of Judge—Omission to give direction on Material Question of Law.

Three persons were charged with murder. It appeared from the evidence that two persons wounded the deceased while a third person stood near by but struck no blow.

The weight of the evidence indicated that if the second appellant was present at the murder he was the person who struck no blow, but the case was left to the jury on the basis that the second appellant, if present, was one of these who struck a blow. The prosecuting counsel in addressing the Jury clearly explained the law as to common intent but the Judge in fact gave no direction to the Jury as to the probability that the second appellant, if present, was the person who stood near by, and he gave no direction on the law as to common intention in the person who stood near by should the jury find that the second appellant was that person.

Held, by the Court of Criminal Appeal that the conviction of the second appellant must be set aside and a new trial ordered under the Court of Criminal Appeal Ordinance as amended by the Court of Criminal Appeal (Amendment) Ordinance 1937 and 1938.

Hume for 1st Appellant.

Ross and *Samuel* for 2nd Appellant.

Moore (Crown Counsel) for Respondent.

The Judgment of the Court was delivered by **McElwaine, C.J.**—There were originally three accused before the Court, Lechman Singh, Hazara Singh, and Isher Singh. The case for the prosecution was that at about 3.15 a.m. on the morning of September 11th, 1938, one Najar Singh, a watchman at the Lower Station of the Penang Hill Railway, was attacked by two men, one of whom, Lechman Singh, drove a long spear into Najar Singh's stomach, inflicting a wound from which Najar Singh died two days later. In the meantime another Sikh attacked him from the side with a knife, inflicting wounds on the deceased's head and shoulder. According to the deceased's statement there was a third Sikh close by who took no part in the actual attack, but when the deceased succeeded in extracting the spear and attacked his two assailants, the third man called upon the two others to run away.

The deceased made several statements with regard to the assault, and on every occasion identified Lechman Singh as the man who inflicted the fatal wound with the spear. His last statement was a dying deposition made in hospital before a Magistrate in the presence of Lechman Singh. There was also other evidence that Lechman Singh had been seen in the vicinity of the Lower Station a little before and after the murder, and the Court is satisfied that there is no ground for disturbing the verdict in the case of the first appellant.

The cases against the second and the third accused were somewhat different. Neither of them was identified by the deceased, though he described his other actual assailant as a 'tall thin man with a short beard.' This description certainly does not fit the second appellant who is a shortish thick-set man with a full beard. It may or may not have been a description of the third accused, but as the only evidence against him was that of the deceased's widow Mukhtar Kaur, the jury discharged him at the end of the prosecution case.

As regards the second appellant, who was found guilty by a majority of 6 to 1 which was accepted by the learned trial Judge, the prosecution case rested on circumstantial evidence. There was evidence which the jury were entitled to accept, that he was the owner of the spear used by the 1st appellant to inflict the fatal injury. There was also the evidence of several witnesses, most of them Tamils that the 2nd appellant was seen in the vicinity of the crime shortly before and shortly after the crime. It was also proved that the 2nd appellant hoped to obtain employment as watchman on the Penang Hill Railway, and that through the influence of the deceased the job was given to someone else. There was also the evidence of Mukhtar Kaur, of Ujagar Singh and of the deceased himself that he had been threatened by the 2nd appellant in consequence thereof. As regards Mukhtar Kaur, the learned Judge warned the jury to pay little attention to her evidence, and it is possible that she was an accomplice. This Court would, however, point out that in many important details she was corroborated by other witnesses, and if, as would appear to be the case, the jury accepted those witnesses as witnesses of truth, there was ample evidence to justify the conclusion that the second appellant was present when the deceased was murdered, or, at all events, abetted the murder in circumstances which would make him liable to the punishment for murder.

The only difficulty in the case is that the 2nd appellant was well known to the deceased, and if the latter had recognized him as one of his assailants, he would have mentioned him by name, and not attempted to give a description which by no means fitted him. The deceased mentioned Hazara Singh as a possible assailant, but did not identify him as the man who struck at him with a knife. The conclusion seems inevitable that if the 2nd appellant was there, he was the third man in the back ground, and it is probable that the deceased was too preoccupied with his actual assailants to have noticed him closely. There is also evidence that the 2nd appellant when seen by some of the witnesses just before the murder had the lower

part of his face covered up, which indicates that he was known to the deceased and did not wish to be recognized.

In his final address to the jury Crown Counsel explained the law as to common intent with the greatest clarity, and submitted that if the 2nd appellant was there with two others with the common intent of murdering the deceased, it was immaterial who struck the fatal blow. He prefaced his remarks by stating that the Judge would fully direct the jury as to the law. Unfortunately the learned trial Judge did not do so. It seems clear from the summing up that he only directed the jury as to whether the 2nd appellant was the other assailant who struck the deceased with the knife but did not inflict the fatal wounds. It is of course possible that the jury came to the conclusion that he was in fact the assailant with the knife, and disregarded the deceased's failure to identify him and his misdescription of the second appellant's appearance.

If the jury accepted the circumstantial evidence, it was established that the 2nd appellant was seen in the company of Lechman Singh on the evening before the murder, and that he was likewise seen by Chet Singh in the same company immediately after the murder, coming from the direction of the Hill Station, and that he was the owner of the spear with which the fatal blow was inflicted. There was evidence, therefore, from which the jury could properly infer that he was the third man in the back ground who, according to the deceased's statement, advised the two actual assailants to run away, and was accordingly guilty upon the principle of common intent. A finding to this effect, however, is a finding of fact, and this Court is unable to conclude that the jury must inevitably have made this finding. As the jury were never directed by the learned Judge on this particular issue, the verdict in the case of the 2nd appellant must be set aside, and a new trial ordered under the provisions of section 6 (2) of the Court of Criminal Appeal Ordinance (Cap. 11).

New trial ordered.

[APPELLATE CRIMINAL JURISDICTION]

McELWAINE, C.J.

May 11, 1939.

TOK SAM MUI v. REX.

(SINGAPORE MAGISTRATE'S APPEAL No. 29 of 1939)

Women and Girls Protection Ordinance—Section 23 Sub-section 2.

A statement made to the Protector of Chinese under Section 23 Sub-Section 2 of the Women and Girls Protection Ordinance whether sworn or unsworn cannot be a voluntary statement. It cannot be admitted in evidence against the person making the statement in any prosecution against him for trafficking in women or girls and importing women and girls by false pretences offences punishable under sections 5 and 5A of the Women and Girls Protection Ordinance (Chapter 33) as amended by Ordinance 13 of 1937.

Braga for appellant.

Butterfield (Crown Counsel) for the Crown.

This appeal was mainly on questions of fact but a point arose as to the admissibility of a statement made by the accused. So much of the judgment as refers to this point is as follows.

McElwaine, C.J.—A statement made by the accused to Mr. Band on the 26th was put in evidence. Whether the statement was made before or after arrest is not stated but from the order of events in Mr. Band's evidence it is more likely that it was made after arrest. Mr. Band said "I had previously warned him that anything he might say would be used in evidence. I made no inducement, threat or promise".

As the statement was a sworn statement it must be presumed that the statement was taken under section 23 of the Women & Girls Protection Ordinance, as subsection (4) authorises the administration of an oath. If the statement was taken under section 23, it cannot be regarded as a voluntary statement. It was argued by the Crown that the statement not being a confession the case of *Chow Eng v. Public Prosecutor* (1924) 4 F.M.S.L.R. 287 is inapplicable. That case decided that where a confession was taken on affirmation the affirmation constituted a threat or inducement. I doubt the correctness of that decision. An oath may be an inducement for those who respect oaths,—an inducement to tell the truth—but an oath is neither an inducement nor a threat of a kind that would lead the accused to expect to gain an advantage or avoid an evil of a temporal nature in reference to the proceeding against him, and that is the kind of inducement or threat that makes a confession irrelevant under section 29 of the Evidence Ordinance. In *Public Prosecutor v. Thamboosamy* 3 F.M.S.L.R. 18 the Court of Appeal held that where an accused person had been sworn before making a statement at the preliminary enquiry, the statement should be excluded at the trial. I think Sproule J. in a case in which I prosecuted when I was Deputy Public Prosecutor refused to allow me to put in (under what is now section 203 of the Criminal Procedure Code) a statement sworn by the accused at the preliminary inquiry, section 148 (now section 151) at that time not allowing an accused to give evidence on oath at the preliminary inquiry. That is a different point. I think the real objection to an